United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

Case No. **74-1933**

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

VERMONT MARBLE COMPANY,
Plaintiff-Appellee

V.

WACO SCAFFOLD & SHORING COMPANY,
DIVISION OF BLISS & LAUGHLIN
INDUSTRIES, INC.,
Defendant-Appellant

Appeal from the United States District Court
for the District of Vermont
Honorable James S. Holden, Chief U.S.D.J.

APPELLANT'S BRIEF

DICK, HACKEL & HULL
50 Center Street
Rutland, Vermont 05701

Attorneys for Defendant-Appellant

TABLE OF CONTENTS

TABLE OF CASES

RULES

OTHER AUTHORITIES

STATEMENT OF ISSUES

The issues presented for review in this appeal are:

1. Whether the Trial Judge erred in holding that the Navari (VM) April 16, 1969 "acceptance" letter of the "quotation" in the Oldenburg (Waco) letter of August 23, 1968, consummated a mutually binding contract.

2. If a binding contract was then entered into, whether Waco was discharged from the performance thereof by reason of VM's lack of necessary cooperation, thereby hindering and preventing Waco from performing the contract according to its terms.

3. If a binding contract was then entered into, whether the Trial Judge erred in failing to hold that Waco was discharged from performing it under the circumstances existing on and antecedent April 10, 1970, making performance by Waco impracticable because of extreme and unreasonable difficulty, expense or loss involved, or commercial frustration, and otherwise, and for the occurrence of none of which Waco was in contributing fault, and also erred in holding that such circumstances did not discharge Waco from performance on that contract.

4. If a binding contract was then entered into, whether the Trial Judge erred in holding that there was a want of competent consideration under the aforesaid circumstances

to support the agreement entered into between Waco and VM on April 10, 1970 in substitution of the terms of the earlier contract, and in holding that the later agreement was not an agreement valid and enforcible by Waco against VM.

5. If a binding contract was then entered into, whether the Trial Judge erred in failing to hold that VM was estopped from claiming as a defense a want of competent consideration for the later agreement in light of Waco's performance of the later agreement and subsequent payments made thereon by VM to Waco.

6. Whether the Trial Judge erred in denying Waco's alternative motion for a new trial limited to the question of damages.

STATEMENT OF THE CASE

This is an action instituted in the United States District Court for the District of Vermont by plaintiff, Vermont Marble Company ("VM"), a Vermont corporation, against Waco Scaffold and Shoring Company, a division of Bliss and Laughlin Industries, Inc. ("Waco"), a Massachusetts corporation, and was tried without jury by the Honorable James S. Holden, Chief Judge.

The pleadings consist of VM's Complaint (JA 3-4), Waco's Answer with affirmative defenses and its Counterclaims against Waco in two counts (id. 5-10), and VM's Reply in two counts, with affirmative defenses (id. 11-14).

Findings of Fact (id. 51-60) and Conclusions of Law (id. 60-69) issued and include therein a decision, followed by an entry of judgment for VM for a balance in the sum of $47,688.36 after offsetting against the sum of $62,422.57 adjudged in favor of VM, amounts for which it was adjudged to be accountable to Waco totaling $14,734.21 (JA 71).

Following judgment Waco moved for a new trial or in the alternative for a new trial limited to the question of damages, which was denied (JA 72-73). The case is here on Waco's appeal from the judgment and the denial of its motion.

STATEMENT OF FACTS

The Trial Court's findings are as appear in the Joint Appendix, pages 51-69. The following statement of facts is not restricted to those findings, but instead sets forth all material facts, as appellant contends, that were either uncontradicted or supported by the overwhelming weight of the evidence. In our Brief, we will hereafter cite specific findings of the Trial Court believed to be in error as well as failures to find as requested or as required by the evidence.

On August 6, 1968, William Oldenburg, the Chicago branch manager of defendant Waco Scaffold and Shoring Company (Waco), called at the office of Earl W. Richardson, general sales manager of plaintiff, Vermont Marble Company (VM), for the purpose of promoting use of Waco for all the VM's scaffolding

needs in its construction projects (Finding 2). At some point during this brief conversation (Transcript 224) Richardson informed Oldenburg that VM was working on budget estimates (F. 3) on a building to be erected in Albany, New York, known as the Twin Towers project. Richardson asked for what Oldenburg remembers as a "ballpark figure" (Tr. 226), an expression which Richardson admitted using on occasion (Tr. 97, 98). Richardson, however, says he requested a figure to be used for a firm bid (Tr. 16). The Trial Judge found that Richardson requested an "estimate" (F. 3).

There was no discussion between them as to how the job would be scaffolded (Tr. 150, Exhibit BE). Richardson did indicate that they would need a swing staging off a monorail similar to that provided by Waco on another recent job for VM (Tr. 16, 17) but there was no discussion as to how such a scaffolding system might apply to this particular job (Tr. 226, 227). There was no discussion as to the number of stages (Tr. 99, 105) or even the number of setting masons (Tr. 99) that VM would be using on the job. Richardson admitted informing Oldenburg of the setting schedule, namely, a June 1969 start and completion in six months (Tr. 99, 100).

Following this conversation, Oldenburg visited the drafting room where he had access to such drawings as were then available and was given two preliminary drawings

(Ex. 36, 37) which he took back to Chicago for the purpose of preparing a quotation (F. 3).

On August 13, 1968 Richardson wrote to Oldenburg requesting general pricing information for use in all of VM's branches, and concluded by requesting his "quotation" on the Twin Towers job to assist in negotiations with the contractor (F. 5, Ex. 7). In fact, the negotiations referred to in this letter were still preliminary. As of December 24, 1968, VM did not yet have the specifications upon which to base a firm bid (Ex. H). The contract was not received by VM for signature until March of 1969 (Ex. M), and as of April 15, 1969 the contract was not yet completed (Ex. S).

On August 22, 1968, Richardson called Oldenburg and received a verbal quotation of $10,000. This was confirmed by letter from Oldenburg, dated August 23, 1968, as follows:

> "In regard to our phone conversation on the 22nd of August, the job at Capitol Hill - Twin Towers, Albany, New York. The price I quoted you of $10,000 includes the following:
>
> Erection
> Dis-mantling
> One intermediate change
> Over-head protection
> Duration of job
>
> If there is any further information you need regarding this, or any further breakdown, please feel free to call on me." (Ex. 1).

This quotation was based upon the two "preliminary" (Ex. 7) drawings supplied by VM (Ex BE). These suggested

a four-sided building (Tr. 230) and did not illustrate the sixteen faces (Ex. DA) on the building (Tr. 386). They suggested only one instead of eight sheer walls (Tr. 387-8, 233, 251, 288). They did not indicate that there was masonry behind the marble facade so that there would be a masonry contractor occupying the same space where the setters would be working (Tr. 389-90, 229-232).

Oldenburg's quotation assumed a four-sided building, with 4 swing stages, one for each side, suspended from a monorail (Tr. 252). He did not know the number of setting masons to be used nor the number of stages contemplated (Tr. 99, 105). It appears from Exhibit AL that Richardson had budgeted for six setters, or at the most six stages (Tr. 99), where in fact 12 - 15 were eventually used (Tr. 431). Oldenburg also assumed that other trades would not be working on the exterior of the building at time of marble setting (Tr. 248).

This quotation was intended by Oldenburg as a "ball-park figure" and not a firm bid proposal (Tr. 235). It lacked any of the details that typified the usual bid proposals that Waco customarily supplied to VM when a firm bid was intended, such as the type of scaffolding system, the number of feet of track, the number of stage units to be supplied, or the anticipated duration of the job (See

Exhibits CM, CN, CO and CP). Richardson himself admits the letter seemed "too simple in its simplicity" (Tr. 111).

The customary practice in the trade is to supply an estimate to be used by the marble-setter in its negotiations with the general contractor, and after the marble-setter has been awarded the job, a firm bid proposal is prepared (Tr. 383-385). As a matter of fact, until the final architectural drawings are available (Tr. 238), and particularly the structural drawings (Tr. 237), a final suspension system cannot be designed (Tr. 237, 385). On this project, the first set of structural drawings was not received by VM until April of 1969 (Ex. O).

Meanwhile, it was becoming apparent that VM was facing considerable delay in delivery of the marble from Italy (Exhibit S, Paragraph 2). The general contractor wanted VM to start by July 7, 1969, using five setters (Ex. S , Par. 4), and warned that the building would be closed in by December 31, 1969 and that the column returns at windows had to be in before then (Ex. S , Par. 3).

On April 16, 1969, VM contacted another scaffolding company and received a quotation of $4,000 per month plus planking and plus the labor costs in erection and dismantling (Ex. R), which translates into a figure several times in

excess of Waco's quotation. Thereupon, on the same day, Peter Navari, on behalf of VM wrote the following letter to Waco:

> "This is to advise you that we have closed the order for furnishing the marble and erection of same for the above project.
>
> We used your quotation in bidding this work in the amount of $10,000.00 given to us in your quotation to Mr. Bill Richardson dated August 23, 1968. This is to advise you that we accept your quotation for erecting and dismantling of a suitable scaffold for our use in erecting the exterior marble on this building.
>
> It is too soon to tell you when we expect to start setting. Our guess would be the latter part of July or August. We will keep you advised." (F. 10)

At the time of the Navari letter, the contract for marble setting had been amended to provide for an erection start seventy five days after approval of shop drawings and release for fabrication, shop drawings to be approved no later than June 30, 1969 with completion within one year of the starting date (See March 3, 1969 amendment to Article 3 in Ex. 15). Thus, VM knew that it was "accepting" a quotation on a job no longer scheduled to start in June of 1969 and finish within six months, as Richardson had previously represented. There is no evidence that VM ever notifed Waco of these contractual changes relative to the starting date and duration of the job. It was left for Waco to discover, over the ensuing months, that the original scheduling would not be adhered to.

Oldenburg was surprised to receive the Navari "acceptance" letter because he had never set forth in detail what scaffolding system would be provided, nor had he secured the necessary approval of the system from the State of New York (Tr. 242). He forwarded the letter to William Schmitt, a salesman at Waco's recently-established Boston branch, together with the two preliminary drawings (Ex. 12). He also sent to William Kuse, the Boston branch manager, a copy of a bid proposal used on a previous VM job to indicate the way in which the job should be bid, pointed out that labor costs had gone up, and advised against bidding too high or the job would be lost to competitors (Ex. 13).

On May 12, 1969, Schmitt met at the job site with Joseph Cavalieri, VM's construction manager (Tr. 279). Cavalieri noted with some surprise that Waco did not seem to have a detailed scaffolding system already devised to support its $10,000 figure (Tr. 144). Schmitt examined the plans for the first time (Tr. 280). At that point, Schmitt observed that he was dealing with a 16-sided building (Tr. 285) with at least 8 sheer walls (Tr. 288), an overhanging top 1 1/2 stories, a 4 foot high parapet, and a masonry building (Tr. 286). He discovered that there was a question when the job would start, or even whether it could start in 1969 (Tr. 281).

The masonry contractor had its staging around the entire building (Tr. 282), and although there was some general talk about how the job might be handled (Tr. 282), until Schmitt knew the scheduling it was too early to develop specific plans (Tr. 283). Whether the $10,000 estimate was still feasible depended on when the work would start, the progress of the other trades, and the speed with which the work would be completed (Tr. 290). It was left that Cavalieri would notify Schmitt when things got "a little hotter" (Tr. 284).

Schmitt was next at the job site in August of 1969 (Tr. 291). At that point, the mason was at the ninth or tenth floor, which made unsuitable the monorail system originally contemplated by Oldenburg (F. 12, Tr. 292). Schmitt then suggested a cantilever type scaffold (gizmo), a rolling outrigger platform that is secured inside the building (Tr. 293, Ex. CW) and can be wheeled from one location to another (Tr. 295). Schmitt contemplated the use of six gizmos (Tr. 295). At this point, he still could not verify the $10,000 estimate because he still did not know what the conditions would be when he actually had to perform (Tr. 296).

Schmitt was next on the job site in September or October (Tr. 296). At this point, it appeared that no major setting would be done until the following spring (Tr. 297). VM

was looking to do a few more columns before the winter came (Tr. 297) and for the short period involved it was suggested that the mason's scaffolding could be used (Tr. 298). Meanwhile, Schmitt showed Cavalieri some sketches of the gizmo and they were going to sleep on it (Tr. 300).

On October 16, 1969, Schmitt advised John Shackelford, assistant general sales manager for VM, that a simple monorail system would no longer be feasible, and that rolling towers (gizmos) would also be needed and for a longer than anticipated job duration, so that the original assumptions, and the original quotation no longer applied (Ex. 44). Richardson himself acknowledges that he knew in the fall of 1969 that Waco was not going to perform for $10,000 (Tr. 63). There was no change in this situation over the winter (Tr. 64).

Meanwhile, Cavalieri used the mason's scaffolding for two weeks of marble laying in 1969, finishing November 28, 1969 when winter closed in (Tr. 300-1, 100, 68). Unknown to Schmitt, VM had a competitor, Patent Scaffolding Company, construct some gizmos (Tr. 301). No request had even been made for Waco to supply these nor was the cost subsequently charged back to Waco (Tr. 302). However, Schmitt was asked and did agree to work a credit for the cost of renting the mason's scaffolding (Ex. 45). Thus, entering 1970, Waco had yet to be called upon to supply any scaffolding (Tr. 303).

Schmitt and Cavalieri met at the job site in Albany on January 28, 1970 (F. 14, Tr. 303). At this time, the project had advanced to a point that led Schmitt to believe that the prior scaffolding plans would require revision (F. 14). The scaffolding project was complicated by the installation of mullions (metal window frames) and glass in the windows (F. 14). Each window was divided into three sashes, the largest of which was 3'4" x 6' (Ex. CU). This eliminated the use of a standard gizmo because it left only a 3'4" opening where before there was a 24 foot opening (Tr. 307). To meet this development, Schmitt proposed specially designed and fabricated units (F. 14) with a hinged platform to wrap around the columns (Tr. 307), to be paid for by VM as a special (F. 14). Cavalieri said they might need 18 such units (Tr. 311-12) and indicated that he expected these to be provided for the $10,000 figure (Tr. 312). As a matter of fact, Cavalieri conveyed the idea that Waco was obliged to give him anything he wanted for the same figure (Tr. 312-13). Schmitt made it clear that there would be no performance on that basis (F. 14, Tr. 314).

On February 4, 1970, Kuse telephoned Cavalieri and reiterated that Waco would not perform on the basis of the original quotation (Ex. 16). Thereafter, Cavalieri and Shackleford met with Kuse and Schmitt, at which time Kuse told Shackleford that "this thing has gotten out of hand" and again

refused to perform for $10,000. Shackleford said the matter would be referred to legal counsel (Tr. 315).

On February 6, 1970, Cavalieri wrote Kuse and Schmitt and insisted that the work should start in two weeks and Vermont Marble would insist on the $10,000 figure (Ex. 17). On February 17, 1970, Donald Moritz, vice president of Waco, replied and again reiterated that Waco would not proceed at that figure (Ex. 20).

At this point, Cavalieri contacted other scaffolding sources, including S.A. Beltrone, Inc., the masonry contractor which had scaffolding in place under lease from Albany Ladder (F. 15). Beltrone responded with a quotation that was in the range of $50,000 to 60,000 (Ex. 23, Tr. 42, F. 15). Although Richardson accepted the fact that Waco was refusing to proceed on the basis of the 1968 quotation, he believed Waco could do better than the Beltrone quotation (F. 16) and he telephoned Moritz and asked for help (F. 16).

Moritz agreed to meet with Richardson at the construction site, provided Richardson assured him there would be no discussion about the original $10,000 quotation (F. 17). Moritz said that he would come only if the past were considered dead and forgotten (Tr. 395).

On April 10, 1970, Richardson, Moritz and their key personnel met near the job site (F. 18). When Cavalieri referred to the $10,000 figure, Moritz again stated that if VM was still talking about $10,000 he would get on the plane

and return home (F. 18). Richardson instructed Cavalieri not to discuss the subject of the original quotation any further (F. 18).

By now, the timing was such that Waco could not gauge the speed at which the work would have to be done (Tr. 397). Obviously, VM would use as many men as was required to do what was necessary within the time frame (Tr. 397). Therefore, instead of a fixed price, it was agreed that VM would determine its needs and that Waco would furnish whatever was requested by signed purchase orders (Tr. 397, 74). A schedule of prices for certain standard items was agreed upon, with a 25 percent discount on tubular scaffolding (F. 18, Tr. 74). Waco would not provide any of the labor required for erecting and dismantling (F. 18, Tr. 76).

After the procedure and pricing was agreed upon, (Tr. 76, 77), Richardson asked Moritz what he thought the job could be done for (Tr. 400). Moritz answered $30,000, depending on what VM ordered (F. 18). Moritz was assuming a monorail for 150 feet of sheer wall, using about a hundred beams, and six stages for an average of four months (Tr. 406-8). This figure did not include labor because labor was not a part of the new arrangement (Tr. 400).

Richardson and Moritz shook hands on this new arrangement (Tr. 402). Thereafter, Waco proceeded to supply scaffolding and the job progressed until completion, the last rental charge running through January 15, 1971 (Invoice 8089, Ex. DB).

The amount ordered by Cavalieri was greatly in excess of what Moritz anticipated or the job required. Schmitt warned Cavalieri by July that the purchases were excessive and that the job could be done more economically but Cavalieri insisted (Tr. 320-21).

VM ordered not 150 but 833 feet of monorail (Tr. 321). It ordered not 6 but 56 stages (Tr. 408) although it had from 6 to 12 and never more than 15 setters on the job at one time (Tr. 162, 431). It ordered not 100 but 213 beams (Tr. 408). It ordered 72 hoisting machines, of which 12 to 20 were never taken out of their burlap bags (Tr. 320). It had 1300 feet of staging to go around a building that had a perimeter of only 1100 feet (Tr. 408).

The earliest Waco invoices were dated May 28, 1970 (Ex. CL). Five invoices, dated May 28 and 29, totalling $3,187.27, were paid on July 11, 1970 (Ex. CL). Two other invoices, dated May 28, 1970, totalling $6,766.92, were still outstanding on July 15, 1970 when Richardson told Cavalieri to pay no further invoices (Tr. 59-60, F. 19).

From that point on, Cavalieri continued to receive monthly invoices for continuing rental time which he sent on to the home office (Tr. 170-1). Richardson admits that VM did not intend to pay these invoices but did not notify Waco and continued to use the rented equipment (Tr. 84-85, 120-21).

In October and November of 1970, Moritz telephoned Richardson about the overdue invoices (Tr. 409-10). Richardson

pretended that VM intended to pay these, making excuses for the delay, such as "Cavalieri must have the bills" or "they must be around the office" (Tr. 410, 121).

VM does not dispute that Waco performed its April 10, 1970 agreement in every respect (Tr. 172, 409). Scaffolding rental charges came to $77,073.27, of which only $3,187.27 has been paid (F. 19).

ARGUMENT

I. THE HOLDING THAT THE OLDENBURG LETTER CONSTITUTED AN OFFER WHICH WAS ACCEPTED BY THE NAVARI LETTER, CONSUMMATING A CONTRACT MUTUALLY BINDING ON THE PARTIES, IS PREJUDICIAL ERROR.

The Trial Judge held that the Oldenburg letter of August 23, 1968 constituted an offer which VM accepted by Navari's letter of April 16, 1969, resulting in the consummation of a contract mutually binding upon the parties, which Waco failed to perform without legal justification, by reason of which it is liable to respond to VM for damages (JA 60-63).

It is our contention that the antecedent circumstances surrounding and prompting these letters establish that the Oldenburg letter did not constitute an offer; that if such letter did constitute an offer at law, the Navari letter did not constitute an acceptance but was instead a counter-offer; and that if the Oldenburg letter did constitute an offer it was not accepted within a reasonable time. For each and all of these reasons a mutually binding contract was never consummated.

Involved under this heading is the Oldenburg letter of August 23, 1968, quoted supra 5, also in F.6 (JA 53), and which was held to constitute an offer on the part of Waco, and the Navari letter of April 16, 1969, quoted supra 8 and also in F. 10 (JA 54), which was held to constitute an acceptance of that offer by VM.

A. The Oldenburg letter was not an offer but merely an inoperative step in the preliminary negotiations between the parties.

Our position is that in light of all the surrounding circumstances giving rise to the Oldenburg letter, the only interpretation warranted is that it was not an offer, but merely a step in the preliminary negotiations between the parties. As a consequence, the Navari letter of "acceptance" did not consummate a contract binding upon the parties.

The determination whether a certain communication by one party to another is an operative offer, and not merely an inoperative step in the preliminary negotiations, is a matter of interpretation in the light of all the surrounding circumstances. 1 Corbin, Contracts § 23 at p. 67. A letter intended merely as a preliminary negotiation should not be construed as an offer. 17 Am Jur 2, Contracts, § 31.

Based upon matters set forth in Findings 2-4 (JA 51-53) with respect to the August 6, 1968 meeting between Oldenburg and Richardson and their subsequent exchanges leading up to the Oldenburg letter to Richardson of August 23, 1968 set forth in Findings 5-6 (JA 53), the Court concluded, in substance, that:

When Oldenburg took the preliminary drawings found in Finding 3, he took them to enable him to submit a "firm quotation" upon which VM could rely in submitting its bid to the general contractor for the marble construction work on the CTT project. "Waco's direct response to VM's request for a quotation was more than an estimate. It was an offer by Waco..."(JA 61).

Our contention is that these conclusions are unwarranted and constitute prejudicial error. The facts well found and all the material and uncontroverted evidence compelled a contrary conclusion, namely, that the Oldenburg letter was a mere estimate on the part of Waco submitted to VM to enable the latter to submit a budget estimate to the CTT project architect.

The Trial Judge found that during their August 6, 1968 meeting Richardson told Oldenburg that "VM was working on budget estimates" (emph. supp) for submission to the CTT architect, and he "asked Oldenburg to give him an estimate on the cost of scaffolding" (emph. supp), inviting him to look at the architect's preliminary drawings (F. 3).

At the trial Richardson explained what is meant by "budget estimate" or "budget figure". His uncontroverted testimony is to the following effect (Tr. 11-13):

> Oldenburg presented Richardson with a catalog of Waco's available products and equipment and proposed that he supply additional catalogs and rough information that could be distributed to VM's various branches so that they would be in a position to make "rough estimates" or "budget figures" to use with their "budget estimates" going out to architects or owners. The purpose of a "budget estimate" or a "budget figure" with respect to the use of granite or marble, is to provide the architect or owner with some idea as to what the cost would likely be, either on a per square foot basis, or on a lump sum basis if the drawings have been developed to a stage where approximate or close quantities can

be calculated. With this figure the architect or owner makes a comparison with the cost of various exterior materials in order to determine whether or not marble is feasible.

Of such "budget estimate" or "budget figure", the uncontroverted testimony of Richardson is as follows:

"Q. This (a budget figure) is not a bid figure?
A. This is not what we refer to as a bid figure." (Tr. 13)

This practice of budget estimating for the possible use of marble on a project extends to the estimation of the scaffolding costs, as is corroborated in all its essentials by the uncontroverted testimony of Mr. Moritz, vice president and general manager of Waco, appearing at Tr. 383-385.

As a matter of fact, at the time of the Oldenburg letter of August 23, 1968, and even as late as December 24, 1968, VM did not yet have the specifications upon which to base a firm bid. See VM's letter of complaint to the general contractor about the lack of specifications for bidding purposes (Ex. H). The contract with the general contractor was not even received by VM for signature until March 1969 (Ex. N) and as of April 15, 1969 the contract had not been completed (Ex. S.), nor was it approved by VM until August 22, 1969 after having undergone considerable changes in that same month (Tr. 453-454, 456).

It is uncontroverted that until final architectural drawings are available, particularly the structural drawings (Tr. 237-238), a final suspension system cannot be designed (Tr. 237, 385). As of August 23, 1968, Oldenburg could no more have prepared a firm bid on the scaffolding than VM could

have prepared a firm bid on the marble setting.

VM has been engaged in marble installation work since early in Richardson's employment in 1951. His and their experience included 42 story and 33 story highrises (Tr. 87-88). Oldenburg himself had submitted proposals to VM in 1967 which resulted in a 55 story building in Texas and also a highrise in Michigan (F. 2 at JA 51-52). It is in the light of their prior experience and previous dealings that the Oldenburg letter of August 23, 1968 must be read.

The Oldenburg letter clearly lacked any of the details that typified the usual bid proposals that Waco customarily supplied to VM when a firm bid was intended, such as the type of scaffolding system, the number of feet of track, the number of stage units to be supplied, or the anticipated duration of the job (Exs. CM, CN, CO and CP). Richardson himself admitted that the letter "seemed too simple in its simplicity" (Tr. 111).

As testified by Oldenburg his letter was intended as a "ball park figure" and not a firm bid proposal (Tr. 235). Whether a communication is a quotation or an offer depends upon the intention of the transmittor of the communication, as it is manifested by the facts and circumstances of the particular case. 17 Am Jur 2, Contracts, § 33 at p. 372.

It was error for the Trial Judge to treat the Oldenburg letter as an offer when the facts and circumstances as set forth above make it manifest, as a matter of law, that the

Oldenburg letter was intended merely as a step in preliminary negotiations between Waco and VM.

B. Navari's letter was not an acceptance but a counter-offer.

The principles of law applied by the Trial Judge in construing the Oldenburg and Navari letters as an offer and acceptance are set forth in his holding that:

> "There was no time limitation imposed and thus was available for acceptance within a reasonable time from its submission. Restatement of Contracts § 40. Under the circumstances which gave rise to Waco's offer, it was implicit that the quotation would be used by the offeree in VM's negotiation with the prime contractor." (JA 61).

and also that:

> "The court must construe the defendant's promise according to the context of its proposal and as it would be reasonably construed by the offeree..." (JA 62).

The circumstances to which the Trial Court alludes are found as facts and are recounted in detail in Fs 1-6 (JA 51-3).

However, with respect to the August 6, 1968 meeting between Oldenburg and Richardson, as found in Fs 2-4, there was yet another material fact and circumstance which the trier failed to find and failed to consider, which was essential to a reading of the Waco offer in its proper context.

Specifically, testifying as to what transpired at that meeting with respect to VM's contemplated job, Richardson on cross-examination admitted as follows:

"Q. You indicated to Mr. Oldenburg that the job was going to start when?
A. I believe June of '69.

Q. And be completed in June of '70?
A. In six months.

Q. In six months?
A. Six months." (Tr. 100)

even as VM's man in charge of its job, Cavalieri, admitted that the job was to start in June, 1969 (Tr. 155-56).

Having the foregoing admissions in mind, and applying the identical principles of law set forth by the Trial Judge, the Oldenburg letter, including the phrase "duration of job" as there used, read in its proper context, constituted an offer by Waco to perform scaffolding services in aid of the marble setting on the contemplated CTT project within the time framework of that job as Richardson had represented it to Oldenburg, namely a job to start June 1969 and to be completed in six months. There was not even a scintilla of evidence produced at the trial that at the time of the Oldenburg letter, or for that matter even at the time the Navari letter was written, Waco had received notice or knowledge of any change whatsoever in this represented time schedule.

The Trial Judge erred in failing to find these representations for they were material ultimate facts established by the evidence, and were required to be considered in the proper construction of the Oldenburg-Navari exchange.

It was the duty of the trier to make findings of fact (FRCP 52(a)) even if no requests to find had been filed (5A Moore's Fed. Prac. ¶52.10) on every material issue presented by the pleadings and supported by the evidence (53 Am Jur, Trial, § 1134). To the same effect, Hammonds, Inc. v Flanders, 109 Vt 78, 191 A 22 (1937); Raithel v. Hall, 99 Vt 65, 70, 130 A 749 (1925).

If we accept the Trial Judge's holding that the Oldenburg letter constituted an offer by Waco, it was an offer by Waco to perform scaffolding services for the marble setting job on the CTT project within the time framework of that job as Richardson had represented that time framework to be, namely the setting to start in June 1969 and be completed in six months. The Navari letter, held by the Trial Court to constitute an acceptance, must be examined in the same light.

When so examined, the Navari letter must be seen as an acceptance on terms varying from those proposed by the offer, because it stated, in pertinent part, as follows:

> "This is to advise you that we accept your quotation for erecting and dismantling of a suitable scaffold for our use in erecting the exterior marble on this building.
>
> It is too soon to tell you when we expect to start setting. Our guess would be the latter part of July or August. We will keep you advised."

The rule applicable in testing whether there has been a valid acceptance of an offer is well established. An acceptance of an offer, to be good, must in every respect meet and correspond with the offer. It may not fall short and it may not go beyond the terms proposed in the offer, but must exactly meet them at all points and close with them just as they stand . Hill v Bell, 111 Vt 131, 134, 11 A2 211 (1940). An acceptance on terms varying from those proposed is, in effect, a counter-proposal and is not binding until it is itself accepted. Idem, 135.

Tested by these rules, the Trial Judge erred in holding that "the Navari letter...was a valid acceptance...(and)... consummated a contract mutually binding both parties" (JA 61) because by that letter VM completely varied the time schedule implicit in the Oldenburg letter.

Implicit in the Waco offer was that VM's contemplated marble setting job would start in June 1969. The Navari letter postponed the start to an indefinite future date stating "It is too soon to tell you when we expect to start...our guess would be the latter part of July or August", and that VM would keep Waco advised.

Implicit in the Waco offer and the use of "Duration of job" in the offer, is that Waco was offering to obligate itself at a charge of $10,000 to perform the matters set forth in the offer with respect to a job to be started by VM in June 1969 and to be completed within six months. However, the Navari letter is an acceptance of a purported offer to errect and dismantle "a suitable scaffold for our use in erecting the exterior marble on this building", or in other words, for erecting such scaffolding for VM's use without regard to when VM would start the job, without regard to how long it might take VM to complete it, and regardless of the advance of other trades and the concomitant problems (see supra 10-12) arising by reason thereof. The need and

attempt by VM to enlarge upon the Waco offer becomes apparent from the evidence as restated supra 8 and infra 31, 32.

Thus, the Navari letter, in the guise of an "acceptance", was no more than an attempt by VM to obligate Waco to see that at all times VM would have "a suitable scaffold" for its use in the performance of its marble setting job whensoever, howsoever long, and in whatsoever manner VM might find convenient for its purposes. Waco, however, did not offer to so obligate itself to VM.

The Trial Judge, commenting upon the defendant's argument that Navari's use of "suitable scaffold" varied Waco's "offer", found this not persuasive because:

> "It was implicit in the written proposal submitted by Waco on August 23, 1968 that the scaffolding to be provided would be suitable for the marble setting for the CTT project as determined by the defendant." (JA 62)

It is respectfully submitted that the Trial Judge did not thereby address himself to the basis of our claim. Of course, if the Oldenburg letter constituted an offer, it was implicit that the scaffolding to be provided would be suitable for VM's marble setting project, but only for the period starting June 1969 and ending 6 months thereafter. It is because the Navari letter called for "a suitable scaffold" without any limitation as to when VM might start or how long VM might take to set its marble, that the Navari

letter constituted a variance on the offer made by Waco.

Obviously, a six month job started in June and completed before winter, would tie up scaffolding equipment for only six months time. A job starting late and interrupted by winter would either tie up equipment throughout the winter or require the expense of dismantling and re-erection. The labor and material costs for scaffolding on a job that actually starts a year late would likely run more than had it started a year previous. It seems self-evident that the anticipated starting date and duration of the jobs were essential elements that underlay the Waco offer.

We would note here that although the general contractor wanted VM to start the job by July 7, 1969 and warned that the building would be closed in by November 31, 1969 before which date the windows had to be installed (Ex. S, Par. 3-4), VM did not start the job until November 10, 1969, discontinuing on November 26 when the winter weather set in (F. 13 at JA 57), resuming in March or April of 1970 (Tr 69) and continuing through January 15, 1971 (Invoice 8089, Ex. DB).

In addition to the number of months that equipment is tied up and the increased labor and material cost associated with a late start, there is another aspect of scheduling that

crucially affects the scaffolding cost and that must be considered if the Oldenburg offer is to be given a proper and reasonable context. Obviously, the scaffolder makes certain assumptions about the scaffolding systems that a certain job will require. If the marble setter's delay in starting permits other trades to advance to a point where the assumed scaffolding technique no longer applies, an entirely new or at least a different scaffolding plan is required to replace the one upon which the original bid was prepared. Thus, in this case, the progress of the mason, the installation of mullion and of glass, all materially altered the original scaffolding concept.

For all of these reasons, the representations as to job start and duration were vital to the Waco offer. It was because Navari already knew that scheduling changes were underway when he wrote his letter of "acceptance" that he employed language designed to enlarge upon Waco's actual undertaking. The Navari letter of "acceptance" constituted an acceptance on terms varying from those proposed in the Waco offer and did not consummate a mutually binding contract. At law, the Navari letter was merely a counter-proposal. Hill v Bell, supra at p. 135.

It does not avail VM to establish that circumstances required changes in the time schedule between the dates of Richardson's representations to Oldenburg and the

Oldenburg - Navari exchange, unless it can also establish that VM had communicated the fact of such changed time schedule to Waco and that the latter had agreed to such change. A search of the transcript will reflect that VM has not sustained this burden. What is established by the evidence is that on March 3, 1969, some six weeks before the date of the Navari letter, Waco and the general contractor agreed to an amended time schedule, as more particularly appears on the signature page of the contact entered into between VM and the general contractor (Ex. 15). There is, however, no evidence whatsoever tending to establish that VM communicated this amended time schedule to Waco at any time before Waco received the Navari letter, or that prior to its receipt, Waco had otherwise acquired notice or knowledge of such change.

Thus, if by the Navari April 16, 1969 letter VM intended to obligate Waco to furnish the scaffolding based upon a time schedule such as that appearing in the March 3, 1969 amendment of its contract with the general contractor (Ex. 15) or any other time schedule in variance with that projected by Richardson at the August 6, 1968 meeting, the Oldenburg and Navari exhange could not result in a contract between the parties because there was not mutual assent or meeting of the minds. See 17 Am Jur 2, Contracts, § 18 and cases cited, including

Gorham v Meachem,, 63 Vt 231, 232, 22 A 572 (1891) holding that there must be found concurrence of intention between both parties.

For the reasons set forth, it is submitted that the Trial Judge erred in holding that the Navari letter constituted an acceptance of the offer contained in the Oldenburg letter.

C. If the Oldenburg letter constituted an offer, it was not accepted within a reasonable time.

The Trial Judge held that the Oldenburg letter of August 23, 1968 was an offer in which there was no time limitation imposed and thus was available for acceptance within a reasonable time from its submission, citing Restatement, Contracts, § 40, and then held that the Navari letter of April 16, 1969 was a valid acceptance (JA 61). Thus, the Court held that the submission of VM's acceptance 231 days after the submission of Waco's offer constituted an acceptance within a reasonable time. Please see 1 Corbin on Contracts § 36 at p. 149.

As Professor Corbin puts it (id, p. 147-8), a reasonable time is the time that a reasonable man in the exact position of the offeree would believe to be satisfactory to the offeror. It is not the time that the offeree would like to have to make estimates and calculations, however reasonable it may be for him to desire the additional time.

It depends upon the nature of the contract proposed, the usage of business and the other circumstances of the case which the offeree at the time of his acceptance either knows or has reason to know. Restatement, Contracts § 40(2). Where a bilateral contract is contemplated a reasonable time is generally brief and this is especially true with regard to commercial contracts (id. Comment b.).

It is our contention that the Trial Judge erred as a matter of law in holding that a lapse of some 230 days was a reasonable time, and that as a matter of law the Trial Judge should have held the offer to have lapsed.

In Staples v. Pan-American Wall Paper & Paint Co., 63 F.2d 701 (C.C.A.3, 1933), the Court, as quoted in 1 Corbin supra, §36, footnote 7 at p. 152, said:

> "The lapse of 101 days from the time of the offer without an acceptance was so long that no fair-minded man could have any doubt that the delay was unreasonable and was sufficient to justify the Court in holding, as a matter of law, that a reasonable time for acceptance had expired."

Staples involved an offer to purchase corporate stock and admittedly is factually unlike this case, but the principle would seem the same, and the above quotation is particularly appropriate here.

Mr. Richardson, on cross-examination, admitted that there had been annual union labor rate increases in the interval between August of 1968 and April of 1969 (Tr 101). Furthermore, it is a matter of general and common knowledge that during that time building costs, including cost of labor,

materials, and equipment were spiraling upwards at a high rate.

These matters were well known to those involved in the building construction and allied trades, including those involved in marble setting or the furnishing of scaffolding. These were matters of which judicial notice could be taken (13 Am Jur 2, Bldg. etc. Cont., § 120), and the Trial Judge should have taken judicial notice thereof even as in the Staples case, judicial notice was taken of the rapidly falling stock market. These were matters of which this Court may now take judicial notice even if they had not been called to the attention of the Trial Judge (New York Indians v. United States, 170 U.S. 1, 32 (1897) and we respectfully request the Court to do so.

Furthermore, after VM had been notified on February 9, 1969 that the subcontract for the setting of marble on the CTT project would be awarded to it and it had decided to accept the subcontract, VM contacted another scaffolding company and received a quotation that the cost of swing scaffolding would run about $4,000 per month plus erection and dismantling costs, for a job of five to six months duration (Fs. 8-9 at JA 53-54). This quotation was received on April 16, 1969 before Navari's acceptance letter to Waco of the same date. Thus VM knew that against the $10,000

quotation contained in the August 1968 letter of Oldenburg, including erection and dismantling, a competitive quotation some 230 days later, excluding erection and dismantling, ran $20,000 for five months or $24,000 for six months. It was only then that Navari acted to accept the Waco "offer".

Also, we would note here that the Trial Judge concluded that under the circumstances which gave rise to the Waco offer, it was implicit that the quotation would be used by VM in its negotiation with the prime contractor, and that the evidence was undisputed that the quotation was relied upon by VM in its proposal to the prime contractor (JA 61). The Trial Judge apparently assumed that when VM transmitted its bid to the general contractor it submitted a firm bid, and that when the general contractor in February 1969 notified VM that it would award the bid to it (F. 8 at JA 53-54), or that at some time prior to the execution of a contract in April of 1969 (Ex. 15), VM in some way bound itself.

To the contrary, on the facts found in F.8 (JA 53-54), and from the March amendment with respect to time schedule (¶1 of Ex. S), all of which are uncontroverted, the necessary conclusion is that no firm bid had been submitted by VM to the

general contractor by the time of the Navari "acceptance" letter. As appears from VM's subcontract with the general contractor (Ex. 15), as well as the first paragraph of Ex. S, it was subsequent to April 15, 1969 that VM entered into a binding contract with the general contractor. Also uncontroverted is that this contract went through a considerable number of changes until as late as August of 1969 (Tr. 453-454) and was not approved by VM until August 22, 1969 (id. 456).

Under these circumstances, and applying the guidelines with respect to what constitutes a reasonable time suggested by Professor Corbin (supra 29) and also as stated in the Restatement (supra 30), it is submitted that the lapse of some 230 days from the time of the Oldenburg letter without an acceptance by VM, in the words of the Staples case quoted supra, 30, "was so long that no fair-minded man could have any doubt that the delay was unreasonable", and so being, it was error for the Trial Judge to not so conclude. In holding that the Navari letter constituted a timely acceptance, the Court committed reversible error.

II. IF THE NAVARI LETTER RESULTED IN A CONTRACT BINDING UPON THE PARTIES, WACO WAS DISCHARGED FROM THE PERFORMANCE THEREOF BY REASON OF VM'S LACK OF NECESSARY COOPERATION.

The Trial Judge, having found that the Navari letter resulted in a mutually binding contract considered Waco's refusal to perform from the standpoint of the applicability of the doctrine of "commercial frustration" or "impossibility" and held it inapplicable, as appears post, but failed to consider it from the standpoint of whether Waco was legally justified in refusing to perform by reason of VM's failure to meet the conditions precedent to performance by Waco.

We contend that, as a matter of law, the Trial Judge was required to conclude that Waco was justified in refusing to perform. It is apparent from the findings and conclusions that the Trial Judge did not directly consider this issue, but only by indirection when considering the applicability of the doctrine of "commercial frustration" or "impossibility" (JA 62-67).

It is a well-settled principle of law in the construction of contracts that when the obligation of performance by one party either expressly, impliedly, or constructively presupposes the doing of some act on the part of the other party thereto, the neglect or refusal to perform such act not only dispenses with the obligation of performance but also warrants rescission. Mansfield v. New York, etc. R.R. Co., 102 N.Y. 205, 211, 6 NE 386, 388 (1886); Restatement, Contracts.

§§ 395, 274(1) and (2). See also 6 Corbin on Contracts, § 1252 in which on page 6 it is said that even if no time is specified, a time will eventually come beyond which it is unreasonable to expect or require a contractor to be ready to perform on his part.

It is our contention that on the facts well found and the material uncontroverted facts required to be found, Waco as a matter of law was legally entitled to and did rescind such contract as may have resulted from the Oldenburg and Navari letters, because of the "constantly changing requirements" referred to in the letter from Moritz, Waco's president, to Cavalieri, of February 17, 1970 (Ex. 20), only the last sentence of which is quoted (F. 14 at JA 57) in the findings.

In that letter, which is quoted verbatim at JA 25-26, after referring to the fact that the Oldenburg letter of August 23, 1968, among other things, was based on the schedule that work was to begin in July or August, 1969 [1] (as to which please see Part I B., supra 21 et seq., including testimony of Richardson, supra 21-22), Moritz advised VM in pertinent part as follows:

> "At various stages of this job you have requested our representatives to evaluate your scaffolding requirements. During each visit our people found that construction progress had made impracticable the previously planned scaffolding system. On each such occasion we have recommended an alternate system which was necessarily more complex and expensive than the previous recommendation. We have tried to work with you to devise a system which would meet your constantly changing requirements.

---

[1] Apparently referring to the Navari letter of April 16, 1969

> As you have been aware since last May, we have no intention of performing this new job for a price which applied to an entirely different one. Our efforts to negotiate an agreement for your current requirements have met only with very rigid responses such as the one contained in your letter of February 6, 1970. We trust that during these many months you have sought an alternate method and/or supplier for your scaffolding requirements."

Certainly at the January 28, 1970 meeting between Cavalieri and Schmitt Waco made it clear that there would be no performance on the basis of a $10,000 contract price (F. 14 at JA 57). In addition, attention is invited to the additional uncontroverted evidence with respect to the circumstances of this meeting as set forth supra 12. Other than the use of "May" in the Moritz letter, the uncontroverted evidence establishes all of the matters set forth in that letter for Waco's refusal to perform.

If the Oldenburg and Navari letters resulted in a contract between the parties, then implicit in that contract was that VM would furnish Waco with a scheduling time so that it could prepare and install the proper scaffolding required for the building at the point in time when the marble setting was to be done (Tr. 283). Let us review the sequence of events to determine if and when such scheduling information was supplied.

The first meeting after the April 16, 1969 "acceptance" letter was held on the job site on May 12, 1969 and was between Schmitt and Cavalieri (F. 12 at JA 55). At this meeting

Schmitt received no indication from Cavalieri as to when the marble setting would start except that the June 1969 deadline was going to be extended. There was no projection made at this meeting as to when the setting would start. The parties had a preliminary discussion about the ways in which the job could be done but at that time it was inappropriate to decide what the details of the scaffolding scheme would be, basically because Schmitt could not get the schedules and Cavalieri did not know what marble he was going to have to start with, or when (Tr. 279-284).

At this meeting Schmitt examined the plans for the first time (Tr. 280) and observed the building and what he was dealing with. He noted advances made by the masonry contractor which had its staging around the entire building, as set forth supra, 9-10, and he and Cavalieri had preliminary discussions about the way the job could be done depending upon conditions (Tr. 282). At this time Schmitt felt that the job could be accomplished for $10,000 (Tr. 289) but this would depend upon when the work would start, the progress of the other trades, and the speed with which the work could be completed (Tr. 290).

The time schedule directly involved the cost factor because the scaffolding equipment used on the job

must earn its revenue. In order to earn revenue it had to be in use. For example, if a piece of equipment was going to be used from October through the middle of November, and then sit until March, there would be a three or four month period during which it would not earn its living. Thus the extent of its use and nonuse during a given period could ultimately affect the ability of Waco to do the job for the $10,000 (Tr. 290-291).

As it was finally left between Cavalieri and Schmitt, Cavalieri would notify Schmitt when things got "a little hotter" (Tr. 284).

A second meeting was held on the job site between Schmitt and Cavalieri in August 1969 (F. 12 at JA 56). The uncontroverted evidence as to what took place at that meeting is set forth supra 10. In addition, the uncontroverted evidence establishes the following:

Schmitt's purpose at this meeting was to get in again and see what the conditions were, what VM wanted, how they wanted it and when, but at that point in time Cavalieri still did not have a date when the work would start (Tr. 292). Cavalieri still could not furnish Schmitt with a time schedule, and Schmitt could not know whether the $10,000 figure was viable until he knew exactly what the job situation was when the scaffolding had to be produced. (Tr. 296).

The next meeting between Schmitt and Cavalieri was on the job site in September or October of 1969. It is uncontroverted that this meeting was held at the request of Cavalieri to meet with him and personnel of the other trades to see if there were going to be any problems with each other or what the schedules might be, and things of that nature (Tr. 296).

It was at this point that Schmitt learned that no major setting would be done by VM until the following spring although Cavalieri was looking to do a column or a couple of columns in order to demonstrate some progress before the winter (Tr. 296-297). It was suggested that for this short period the existing mason's scaffolding be used (Tr. 298).[1]

Also at this meeting Schmitt showed Cavalieri some sketches of the "gizmo", the use of which was discussed at the August 1969 meeting, and it was left that VM would sleep on it (Tr. 300).

Following the September-October meeting, but not later than October 15, 1969, as reflected in a memorandum from Shackelford to Richardson (Ex. 44), Schmitt informed Waco by telephone of the "possibility" of increased costs for scaffolding on the job which Waco would have to pass along to VM, and explained the reasons therefor. There was nothing

---

[1] Actually this projected marble setting commenced on November 10, 1969 and continued until November 26 when winter weather set in (F. 13 at JA 57).

said to indicate that Waco was refusing to perform, as Richardson himself acknowledges (Tr. 117-18). As also appears from Exhibit 44, VM took the position that Waco should back up its request with facts and figures and let them know why Waco felt it was entitled to more. This request was complied with as appears from Finding 14 (JA 57).[1]

This meeting took place at the job site on January 28, 1970. The CTT project had advanced to a point where Schmitt felt that prior scaffolding plans would require revision. The scaffolding project had become complicated by the installation of mullions (metal window frames) and glass in the windows, and to meet this development Schmitt proposed specially designed and fabricated units at $410 per unit, to be paid by VM as a "special" (F. 14 at JA 57).

The uncontroverted evidence is that with respect to the installation of the mullions and glass, one of the resultant complicating factors consisted of the following:

Each window was divided into three sashes, the largest of which was 3'4" x 6' (Ex. CU) and thus eliminated was the use of a standard "gizmo" because this division left only a 3'4" opening where before there had been a 24 foot opening.

---

[1] Although the Trial Judge at one point states that "no justification was provided by Waco" (F.12 at JA 56), he later finds Schmitt's explanation of the need for specially fabricated units which was Waco's justification (F 14 at JA 57).

To meet this situtation Schmitt proposed specially designed and fabricated units with a hinged platform designed to wrap around the columns (Tr. 307). Cavalieri told Schmitt that they might need 18 of such units and took the position that Waco was to provide these units for $10,000 (Tr. 312). As a matter of fact he conveyed the idea that Waco was obliged to give him whatever he wanted for that figure (Tr. 312-13).

At this time then, the situation was as follows:

At least since May 1969, when he first met with Schmitt (Tr. 126), Cavalieri had known that VM's job was supposed to start in June of 1969 (Tr. 155-56), notwithstanding which it was not until the September or October 1969 meeting that VM made it clear that no major setting would be done until the following spring (Tr. 296-297).

Thus September or October of 1969 was the first time since the Navari acceptance letter of the previous April 16 that VM indicated to Waco any semblance of a schedule of time when it would actually commence the performance of its job, and then only in the terms next above set forth. Further, with respect to the few weeks work it would do before winter weather set in, VM decided to use the mason's scaffolding, so that as the matter stood, what performance VM might want from Waco would not commence until some time in the spring of 1970.

Meanwhile, starting with the May 1969 meeting, the building progressed towards completion and the other trades advanced in the performance of their jobs, with the end result as hereinabove set forth. The resultant situation became exactly as the Moritz letter, quoted in pertinent part, supra 35, 36 was to inform VM.

Even as stated in the Moritz letter, the uncontroverted evidence clearly establishes that Waco had "tried to work with" VM "to devise a system which would meet" VM's "constantly changing requirements" and that Waco had "no intention of performing this new job for a price which applied to an entirely different one".

Indeed, VM was demanding that Waco for $10,000 perform an entirely different job at that price. The original undertaking, if one ever existed, was to supply scaffolding at that price for VM's marble setting job on a building as it had progressed by June 1969 and as construction on it should progress for the next six months.

Now, at the January 1970 meeting, and by reason of no fault attributable to Waco, but simply because of VM's inability to schedule the job within the framework of the time schedule agreed upon with Waco, VM was now demanding that for the same $10,000 Waco supply "suitable scaffolding" for VM's marble setting job on the same building, but on such building as it had progressed by the spring of 1970 and

as construction on it should progress until such time as the marble setting was completed. Thus all of the ensuing changes and complications which Waco would necessarily be confronted with as a result of progress of the construction, the advances of other trades, and increasing labor costs, would have to be taken care of and performed by Waco all for the stated $10,000 figure.

It then comes down to this, that at the January 28, 1970 meeting Cavalieri was demanding that Waco furnish VM with an estimated 18 of these special units, supra 41, without extra charge, so that Waco would be absorbing some $7,380, with the end result that for the balance of the work on the project commencing in the spring of 1970, Waco would be paid only $2,620, less the adjustment for the expense of VM's rental of the mason's scaffolding for the period November 10-26, 1969.

It was at this meeting that Waco for the first time became adamant. Schmitt made it clear that there would be no performance on the basis of the $10,000 figure (F. 14 at JA 57).

We submit that Waco's refusal to perform was legally justified based upon the foregoing sequence of events. Implicit in such contract as may have been entered into between the parties was that VM would cooperate with Waco and perform its

part (please see Annotation, 16 ALR 3 1254, §§ 2-3), ie., that it would schedule performance of its job within such time that it would not be unreasonable to expect or require Waco to perform its part of their bargain. As stated in 6 Corbin on Contracts, § 1252, p. 6, even if no time was specified in the agreement between the parties:

> "a time will eventually come beyond which it is unreasonable to expect or require a contractor to be ready to perform on his part.";

and that in the absence of a provision in the contract providing that notice be given fixing a definite time limit, the Court must determine what is the time limit of his discharge, beyond which he is justified in refusing to perform.

It is submitted that the principle with respect to determination of "reasonable time" quoted from the Staples case, supra 30, is also applicable here. Under the circumstances, the time had come where "no fair-minded man could have any doubt" but that the delay in scheduling had exceeded what was reasonable, requiring the Trial Judge to hold, as a matter of law, that VM's neglect to perform dispensed with any obligation on the part of Waco to perform, and also entitled it to rescind. Mansfield, supra,

While there are situations when the failure to perform is legally excused, there is no evidence in this case that in any way tends to establish any legal excuse for VM's delay in scheduling the time of commencement and the actual performance of its contract.

The Trial Judge found that the marble setting was not undertaken by Waco until November 10, 1969 "although there had been two deliveries of Italian marble at the site" (F. 13 at JA 56-57). There is no finding that there was a delay in the delivery of marble to VM for this job, let alone any reason for such a delay. In his "CONCLUSIONS", the Trial Judge did conclude that "save for a few months delay in delivery of marble at the construction site", there were no unpredictable conditions involved here (JA 67), and to that extent it may well constitute a finding of delay, but as before stated no reasons appear for the delay.

Insofar as it involves Waco, there is not a scintilla of evidence that the delay was in any way due to any act of omission or commission by Waco.

On the other hand, to support a conclusion that the delay in the receipt of marble legally excused VM, the burden of proving the same was on VM. 17A CJS Contracts, § 590 d. The transcript fails to sustain this burden of proof, and in fact, reflects no evidence tending to establish any legal excuse. The evidence is that before the Navari "acceptance" letter was written VM was concerned about marble delivery, for an internal document of VM, in evidence as Ex. S, and dated April 15, 1969, contains the following:

> "2. We must have better service than Italy gave us and that was 100 tons 50 days and then 50 tons per month. At this rate it would take 19 months.[1] This would mean 2 winters and one price increase for setters."

---

[1] This proved a good projection because the job was not completed until January 15, 1971 (Invoice 8089, Ex. DB).

yet there is nothing in the Oldenburg-Navari correspondence which in any way touches upon a delay in the receipt of marble. Thus VM, at the time the Navari letter was mailed, had knowledge of the delay in marble delivery and was in a position to protect itself against such delay. But this it did not choose to do.

In light of the matter quoted above, what suggests itself is that at the time the Navari letter was written VM knew that at the rate it had been receiving marble the job could run for 19 months, including two winters, instead of the June 1969 start and 5-6 months duration represented to Waco, but preferred to attempt to bind VM on the basis of the Oldenburg letter.

Furthermore, even if the delay was caused by the failure of VM's marble supplier, and through no fault of VM or Waco, in the absence of a provision in the agreement between VM and Waco so providing, VM's delay is not legally excusable. 17A CJS, Contracts, § 505 d.

At JA 62-63 the Trial Judge states the proposition to be that for the $10,000 Waco was bound to perform according to its contract or respond in damages unless its refusal to perform was legally justified. Unquestionably the refusal of one to perform an agreed job at an agreed price merely because he has made a poor bargain as to price does not constituate legal justification.

Had VM commenced its job in June of 1969 or with due diligence within a reasonable time thereafter, and if it had continued to run for six months or with due diligence for a reasonable time thereafter, it might well be held that Waco had no legal justification for refusing to perform merely because it had made a bad bargain.

But such is not the situation here. Waco was not refusing to do the job agreed upon for the price agreed upon because it had made a bad bargain at $10,000. Its refusal to perform was based upon the reasons heretofore set forth, and essentially as summarized in the February 17, 1970 letter from Moritz to Cavalieri.

Based upon the foregoing, it is submitted that the Trial Judge committed prejudicial error in concluding that Waco's refusal to perform was unjustified.

III. IF A BINDING CONTRACT WAS ENTERED INTO PERFORMANCE WAS EXCUSED BY THE DOCTRINE OF IMPOSSIBILITY

In the Restatement, Contracts § 454, "impossibility" is defined to include impracticability because of extreme and unreasonable difficulty, expense, injury or loss involved. In one aspect it is sometimes referred to as the doctrine of "commercial frustration".

For the reasons set forth in JA 63-64 the Trial Judge

there held this doctrine inapplicable. Should it be determined on this appeal that reversible error was committed for any of the reasons previously set forth in this brief there is no occasion to consider its application. On the other hand, if determined otherwise, then it is submitted that the doctrine became inescapably applicable here, and the contrary holding is prejudicial error.

Perhaps the leading case on the subject is Transatlantic Financing Corp. v. United States, 363 F2 312 (CA DC 1966). There it is stated, at page 315, that a thing is impossible in legal contemplation when it is not practicable, and a thing is impracticable when it can only be done at an excessive and unreasonable cost. When the issue is raised, the Court is asked to construct a condition of performance based upon a change of circumstances, a process which involves three definable steps, namely (315-16):

> "First, a contingency--something unexpected--must have occurred. Second, the risk of the unexpected occurrence must not have been allocated either by agreement or by custom. Finally, occurrence of the contingency must have rendered performance commercially impracticable."

and unless the Court finds these three requirements satisfied, the plea of impossibility must fail.

Applying these three criteria to this case, it appears first, that something unexpected occurred, namely the extended

delay in scheduling. Second, without prejudice to our contentions under Point II, supra 34-47, the risk of such extended delay was not allocable either by agreement or by custom. Finally, this extended delay introduced unexpected cost factors that rendered performance commercially impracticable.

As propounded in Restatement, Contracts § 457:

> "[W]here, after the formation of a contract facts that a promisor had no reason to anticipate, and for the occurrence of which he is not in contributing fault, render performance of the promise impossible, the duty of the promisor is discharged, unless a contrary intention has been manifested, even though he has already committed a breach by anticipatory repudiation."

Again, applying the Restatement, the extended delay, which Waco had no reason to anticipate and for which it was not in contributing fault, rendered performance by Waco impossible, ie commercially impracticable, and thus Waco's duty of performance was discharged.

In its discussion of the application of the doctrine of excusable impossibility and commercial frustration the Trial Judge, at JA 64, refers to Retail Merchant's Business Expansion Company v. Randall, 103 Vt 268, 271 (1931), City of Montpelier v. National Surety Co., 97 Vt 111, 119, Perry v. Champlain Oil Co., 101 N.H. 97, 134 A.2d 65, 67 (1967), Rutland Marble Co. v. Ripley, 77 U.S. 339, 19 L ED. 955, 960, and Texas Co. v. Hogarth Shipping Co., 256 U.S. 619, 631 (1921), and at JA 66, King v. Duluth, etc., 61 Minn. 482, 63 NW 1105, 1107 (1895).

However, nothing in these cases suggests that when a poor bargain has become such because of supervening or subse-

quent events which are in some way due to the party who seeks the performance of a contract, as is the case here, that the person against whom such performance is sought will not be relieved from performing it.

In the Rutland Marble case the Supreme Court, on the question of the hardship of a contract fair and just at the time it was entered into, quoted the following from Frye, Specific Performance, p. 116:

> "'it will be immaterial that it may, by the force of subsequent circumstances or change of events, have become less beneficial to one party, except when these subsequent events have been in some way due to the party who seeks the performance of the contract'." (emph. supp.)

Implicit from the matter above quoted is that when the facts establish the exception, performance will not be enforced.

Here, the supervening of subsequent events, which we have discussed above in this brief, are in no way due to Waco, and if also they are in no way attributable to VM, and if the risk of these events are not allocable against either party under the original "agreement", then this case comes directly within the ambit of the principle of law for which the Duluth case is quoted at JA 66, and also within that of the Texas case, even though in the latter, unlike here, a war risk was involved, for the doctrines under discussion are not limited to war as a supervening act.

Upon the facts well found, and the uncontroverted facts not found, if the original "agreement" fails to allocate the risk of VM's delay in scheduling the work to

be performed by Waco thereunder, the question involved and the answer thereto are supplied by the last two sentences quoted at JA 63 from Williston, Contracts § 1931 (Rev. Ed.):

> "The important question is whether an unanticipated circumstance has made performance of the promise vitally different from what should reasonably have been within the contemplation of both parties when they entered into the contract. If so, the risk should not fairly be thrown upon the promisor."

It was prejudicial error to hold inapplicable the doctrine of impossibility or commercial frustration.

IV. THE AGREEMENT ENTERED INTO BETWEEN THE PARTIES ON APRIL 10, 1970 IN SUBSTITUTION OF THE TERMS OF THE EARLIER CONTRACT WAS WITH COMPETENT CONSIDERATION AND ENFORCEABLE BY WACO.

If our contentions that Waco was discharged from the performance of the contract is sustained, it seems beyond the need of argument that there was competent consideration for the new agreement and therefore we here consider the question only upon the assumption that these are not sustained.

In his CONCLUSIONS the Trial Judge held with respect to the agreement reached at the April 10, 1970 meeting, that it "is unenforceable for want of competent consideration" (JA 65), and also that at this meeting:

> "In the press of the demands of the general contractor for the plaintiff to resume the setting of marble in

April 1970, the defendant's new representative (Moritz) returned to the construction site and coerced a better bargain." (JA 67).

It is our position that there was competent consideration for the new agreement, that this new agreement was valid and enforceable against VM, and that coercion is not supported by the evidence but to the contrary, the uncontroverted evidence negates such a holding.

We have already reviewed the events through the January 28, 1970 meeting, at which time Waco decided it would not honor the contract for $10,000 (JA 70, footnote 5). Thereafter Waco confirmed that it would not perform on the basis of the original quotation by telephone from Kuse, its Boston branch manager, to Cavalieri on February 4, 1970 (Ex. 16). [1]

As appears in Finding 14 (JA 57), on February 6, 1970 Cavalieri wrote to Waco's eastern branch office insisting on performance. For that matter, he also informed Waco that the target date for starting the marble erection is "on or about March 16, weather permitting" and that in consideration

---

[1] Compare this uncontroverted evidence with the finding as to confirmation by the Boston office appearing in Finding 14, second paragraph at JA 57, from which it would appear that the time of this confirmation is not set forth in proper sequence.

thereof Waco will require at least three or more weeks lead time to get the materials ready, delivered and erected, and that therefore the latest that Waco "could start considering erection of scaffolding would be February 23, which is a short two weeks away", and closed with a request for advice as to the dates when Waco planned to start the erection of the scaffolding at the site so that VM could inform the general contractor (Ex. 17).

Then, and as also set forth in Finding 14, on February 17, 1970 Moritz, Waco's vice-president, wrote a letter to Cavalieri which stated that "we trust that during these three months you have sought an alternate method and/or supplier for your scaffolding needs". This letter is in evidence as Ex. 20.

Following these communications VM's Shackelford and Waco's Schmitt met in Watertown, New York and attempted to renegotiate the "original contract". Waco declined to renegotiate (F. 14 at JA 57-58).

Following this, and not later than March 3, 1970 (Ex. BJ, Tr. 324-27) VM contacted S.R. Beltrone, Inc. and received a quotation for the mason's scaffold in the range of $50,000-$60,000 (F. 15 at JA 58) by letter dated March 24, 1970 (Ex. 23).

Although Richardson accepted the fact that Waco was refusing to proceed on the basis of the 1968 figure of $10,000,

he believed that Waco could supply the necessary scaffolding at substantially less than the Beltrone quotation, and called Moritz and asked for help in getting the marble setting operation restarted (F. 16 at JA 58).

Moritz agreed to meet with Richardson at the construction site provided Richardson assured him that there would be no discussion of Waco's refusal to perform on the basis of the $10,000 figure and Richardson accepted this condition (F. 17 at JA 58). Also in that finding, the Trial Judge finds as a fact what he describes as Moritz's impression of this communication by quoting from his pre-trial deposition.

It is apparently on the basis of this quotation that the Trial Judge concluded that Moritz returned to the construction site "and coerced a better bargain". The basic error here is that the pre-trial deposition of Moritz was never offered, let alone admitted in evidence, on the matter quoted in Finding 17, and it was clearly error for the Trial Judge to have found the quotation as a factor upon which to predicate its conclusion of coercion.

If it was permissible for the Trial Judge to find as a fact the matter quoted in F. 17 based upon testimony in a deposition not in evidence and to so consider it in concluding that VM had been coerced into the new agreement, then everything to which Moritz testified in his pre-trial deposition should also be considered as being facts established in this case.

At least then the quotation could be understood in its full context, for in addition to the passage quoted by the Trial Judge, Moritz's deposition contains his spontaneous answer to that request, as follows (Moritz deposition, pages 28-29):

> "Well, the arrangements had been made first of all through the phone call from Mr. Richardson, and Mr. Richardson specifically asked me if we would help Vermont Marble. He said, we are in a problem. We want your help. And I said, Bill, under the circumstances I can only give you the help on the basic assumption that the old, whatever arrangements you think we had, whatever we wrote to you on February 17, is completely dead...[O]n the basis of that, I am willing to... meet you in Albany at your request...(but)...in no way was I going up there to listen to harangue about what happened in the past. It had to be clearly understood it was over and we are embarking under an entirely new situation, surroundings, a new job, new job conditions and new timetable. And under those conditions I will come up... He said, fine, I understand that. So, we went." (emph. supp)

The February 17 reference is to the letter of Moritz (Ex. 20), which Richardson admitted was merely a summary of a situation that had been developing and had existed since August of 1969 (Tr. 65-66). Simply stated, in the fall of 1969, VM's position was that it had a firm contract and that Waco was obliged to perform. Waco's position was that it was willing to go ahead and do the job for VM but not at the $10,000 figure. VM's position was that it would sue on the contract. Waco's position was, essentially, all right, sue (Tr. 62-63).[1]

---

[1] Compare these undisputed admissions of Richardson on pages 62 and 63 of the Transcript with footnote 5 at JA 70.

As to the evidence adduced at the trial, on the matter now under consideration, Richardson's testimony appears at Tr. 45-6, 71-2. At most, from what appears there, it is only evidence tending to establish that Richardson advised Moritz that the position Waco was taking with their letter, ie., Ex. 20, their "refusal to fulfill the contract", was giving him severe problems because VM had a contract with the general contractor to do this building, and he asked Moritz to come for help, and he knew that if they met, the $10,000 figure was not to be discussed. Nothing there suggests that Waco was "coercing" VM.

Moritz's testimony with respect to this telephone conversation is set forth at Tr. 394-95, and on the point involved is summarized by the following (Tr. 395):

> "I'm not coming up there to argue about everything in the past. I said, if you want to consider the past dead, forget it, then I'm willing to turn loose every asset and resource at my command to try and help you get this job done. He said, done on that basis, I'll accept it." (emph. supp)

Although Mr. Moritz was cross-examined by VM's counsel the transcript reflects that he was not cross-examined with respect to his testimony as to what took place in his telephone conversation with Richardson. The Moritz testimony stands as uncontroverted evidence and the matter quoted was required to be found as fact, but was not.

Thus, when the evidence adduced at the trial as recounted above is considered, it was error for the Trial Judge to conclude that the plaintiff had no alternative

but to go it alone by requisitioning such scaffolding as it thought necessary to complete the job and to erect and dismantle the scaffolding by such iron workers as it could recruit (JA 67).

This is so because the uncontroverted evidence is that VM had contacted other scaffolding companies (Ex. BJ, Tr. 324-27) and by March 24, 1970 Beltrone had come up with a quotation of $50,000-$60,000 (F. 15 at JA 58), this being by letter to Cavalieri included as part of Ex. 23. Finding 15 considered alone negates a conclusion of "coercion" on the part of Waco for VM had an alternative and, at the time it entered into the later agreement with Waco, VM knew it had an alternative. The holding of "coercion" is clearly erroneous.

Stating that the consideration necessary to support the new agreement is the discharge of a prior contract, the Trial Judge cites Manley Brothers Co., Inc. v. Somers, 100 Vt 292, 297 (1927) for the proposition that to constitute a new contract there must be clear and definite intention on the part of all concerned, provable by circumstances that such is the purpose of the agreement (JA 65). Surely, there is nothing in Richardson's testimony or any other testimony adduced by VM which in any way tends to controvert the testimony of Moritz last quoted above where the parties agreed in advance of the April 10, 1970 meeting that what had been was "dead" and that this included the so-called earlier contract claimed by VM.

If the proposition for which the Manley case is cited is applicable here, then based upon the foregoing, there was a clear and definite intention on the part of Waco and VM that the agreement entered into on April 10, 1970 be in discharge of the earlier claimed contract, that the later agreement was in substitution of and superseded whatever prior arrangements either of the parties claimed had been agreed upon.

There is no question but that Waco fully performed the matters required by it to be performed under this new agreement (Tr. 60; F.21 at JA 60). The details of the new agreement and the subsequent conduct of VM and Waco with respect thereto are hereinafter set forth infra, 60-61 and also under Point V.

Under the circumstances set forth above the Trial Judge was required to apply the principle of law set forth in Agel & Levin v. F. R. Patch Mfg. Co., 77 Vt 13, 15, 77 A 792 (1904) and restated in Powers v. Rutland R.R. Co., 88 Vt 376, 395, 92 A 463 (1912) as follows:

> "When a modified contract has been acted upon by both parties and fully performed by the party which broke the original contract and in whose favor that contract was modified, it becomes binding on both parties and the original contract is thereby discharged, unless it appears that such was not the intention of the parties."

Here, it was not until later, and after VM had made some payments under the new agreement, that it decided not to honor the new contract.

In the Agel case the plaintiffs, by correspondence, sold to the defendants a car of scrap iron at an agreed price per net ton delivered. After shipment but before delivery the defendants refused to take the iron at that agreed price whereupon the parties verbally altered the contract by fixing the price at an agreed price per gross ton, and defendants took thereon and paid for it at the latter price. Plaintiffs claimed that the alteration in price was without consideration and void, and sought to recover the difference between the prices. It was held that the new agreement had been acted upon by the parties and fully performed by the defendants, and that the original agreement was not enforceable. Please see Swartz v. Lieberman, 323 Mass 109, 80 NE2 5 (1948).

Thus here, even if there was an earlier contract entered into between the parties which Waco had breached, it is of no avail to VM, and Waco is entitled to recover upon the later agreement as valid and enforceable.

Furthermore, even if under the circumstances above set forth it should be considered that there was no express agreement that the April 10, 1970 contract abrogated the earlier "contract" entirely and took its place, the law in Vermont is as stated in Thomas v. Johnson, 108 Vt 363, 367-68, 187 A 375 (1936) that:

> "As a general rule, when the new contract is in regard to the same subject matter and has the same scope as the earlier contract and the terms are inconsistent either in whole or in a substantial part so that they

> cannot subsist together, the new contract abrogates the earlier one in toto and takes its place, even though there is no express agreement that the new contract shall have that effect."

At this point we would note that in this case the substantive law of Vermont applies. Neither of the parties claimed that the substantive law of any other jurisdiction applied to this case, and no evidence was offered tending to establish the substantive law of any foreign jurisdiction or that it differed from that of Vermont.

On the reasoning set forth in the first full paragraph appearing at JA 65, the Trial Judge held that it is "abundantly clear that plaintiff never intended to surrender, abandon or discharge the original agreement". This holding is not supported by the pertinent facts found and is without evidentiary support. On the facts found and those uncontroverted facts required to be found, only a directly contrary holding is legally supportable for the reasons hereinafter set forth.

Pursuant to the procedures agreed upon at the April 10, 1970 meeting, VM issued purchase orders in the total amount of $77,073.27, and on its part, Waco furnished all of the scaffolding ordered. VM paid Waco $3,187.27 on five invoices submitted prior to July 11, 1970. On July 15, 1970, VM decided to make no further payments. It did not notify Waco of this decision and, in fact, continued to issue purchase orders and to use the materials supplied by Waco. All of the above are contained in Finding 19 at JA 59-60, except that the Court erroneously treats the $3,187.27 as paid on "an invoice" instead of five invoices.

Although not contained in any finding, the uncontroverted evidence is that Richardson, in conversations with Moritz, pretended an intention to pay these invoices, making excuses for the delay, such as "Cavalieri must have the bills" or "they must be around the office" (Tr 410, 121). Richardson's purpose in this deception is self-evident: he intended to deceive Waco into keeping its scaffolding on the job by pretending an intention to honor VM's undertaking.

There is even a question whether the single payment of $3,187.27 was intentional or an accident. In an internal document Richardson states that this was "accidentally paid" (Tr. 86), but Richardson testified at trial that when he prepared this memorandum his recollection was in error and, upon review, the payment was not accidental (Tr. 86-87).

If, as we must, we accept Richardson's testimony that the payment of these five invoices was not accidental, it demonstrates an intention on VM's part, at least until July 15, 1970, to perform its new undertaking, and as such, it is inconsistent with an intention not to surrender, abandon or discharge the original "agreement".

There can be no question but that this payment was pursuant to the new April 10, 1970 agreement. The payment of these invoices and VM's subsequent subterfuges are altogether inconsistent with its obligation of payment under the Oldenburg-Navari correspondence or "contract". That correspondence was silent with respect to time of payment,

and consequently there was no obligation or legal duty on the part of VM to pay Waco any amount thereunder until Waco had fully performed its part of the bargain.

The earlier "contract" was in the nature of a building or construction contract. In such contract full performance of the work is a prerequisite to payment by an owner to a contractor, or by a contractor to a subcontractor, when the agreement does not fix a time for payment, and there is no evidence tending to establish that another time was intended. 17A CJS, Contracts §§ 502 (3)a., d. This principle is not peculiar to the law of building and construction contracts, it is one of general application. 60 Am Jur 2, Payments § 4.

Of course, if we believe Richardson's internal memorandum when it refers to the payment of these invoices as accidental, it would make the actions of VM even more reprehensible. It would mean that VM fully intended from the outset to pay none of the invoices. Suffice it to say, whether VM's decision, through Richardson, not to honor his handshake, was made on April 10, 1970 or on July 15, 1970, his conduct and that of VM was considerably less than honorable.

For the reasons set forth above it was prejudicial error to hold the April 10, 1970 agreement invalid and unenforceable for a want of consideration therefor.

V. THE SUBSTITUTED AGREEMENT IS ENFORCEABLE UNDER PRINCIPLES OF ESTOPPEL.

The holding that the April 10, 1970 agreement was unenforceable for want of consideration (JA 65) is discussed

at length under Point IV. We submit that in addition to the matters there stated, the principles of estoppel apply, including the doctrine of "promissory estoppel", and dispense with any requirement of consideration. This doctrine prevails in Vermont and is recognized as a generalized principle. Overlock v. Public Service Corp., 126 Vt 549, 552 (1967).

As to estoppel other than "promissory estoppel", the doctrine is based upon the grounds of public policy, fair dealing, good faith and justice, and its purpose is to forbid one to speak against his own acts, representations or commitments to the injury of one to whom they were directed and who reasonably relied thereon. Dutch Hill Inn, Inc. v. Patten, 131 Vt 187, 193 (1973).

In Vermont the test of estoppel is whether, under all the circumstances of the case, conscience and duty of honest dealings should deny one the right to repudiate the consequences of his representations or conduct. Idem.

As to promissory estoppel, a promise which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character and which does induce such action or forbearance is binding if injustice can be

avoided only by the enforcement of the promise. Overlock v. Public Service Corp., supra, at 552.

The principle of estoppel is applicable as against a claim that a contract is without consideration. 31 CJS, Estoppel § 110(2), at p. 566. Similarly under promissory estoppel a contract may be held valid and enforceable even though without consideration. Overlock v. Public Service Corp., supra, at 533 -554, 20 Am Jur 2, Estoppel & W § 48.

The principles of estoppel and the doctrine of promissory estoppel have clear application to the facts of this case. The actions of VM evince a total lack of good faith and fair dealing. Either on April 10, 1970 or from and after July 15, 1970, VM falsely represented a good faith intention to comply with the agreement of April 10, 1974 and to deal fairly with Waco on the terms agreed upon and confirmed by handshake. In making a payment of $3,187.37 honoring the first five invoices, it further represented its intention to comply with the agreement of April 10, 1970 and induced further and continuing compliance by Waco. In falsely implying to Moritz in numerous telephone calls an intention to pay the overdue invoices, Richardson furthered these misrepresentations and Waco, relying thereon, continued to keep its scaffolding on the job.

Can VM be heard now to speak against its own acts, representations and commitments to the injury of Waco, to whom they were directed and who reasonably relied thereon? Under all the circumstances of the case, do not conscience and duty of honest dealings deny VM the right to repudiate the consequences of its representations and conduct?

As to Waco, there is not even a suggestion in the facts found that in refusing to perform the earlier Oldenburg-Navari "contract", Waco was acting in bad faith or was not dealing fairly. In addition, we believe that under Point IV we have demonstrated that any implication or conclusion of bad faith on Waco's part in connection with the new April 10, 1970 agreement is not legally sustainable. To the contrary, based upon the uncontroverted evidence, Waco at all times acted in good faith in its dealings with VM.

There is perhaps one finding that requires further consideration, that at the April 10, 1970 meeting Richardson asked Moritz to estimate the total cost of the scaffolding for the job, and that Moritz's answer was $30,000, depending upon what VM ordered (F. 18 at JA 59). So as to avoid any implication that this was an irresponsible estimate or an estimate not given in good faith, and to understand at what point in the April 10 negotiations this occurred, we refer to

the uncontroverted evidence.

Moritz's uncontroverted testimony is that after the unit pricing figures had been put together Richardson asked him what the job could be done for on that basis, and that he gave him an estimate of $30,000 which did not include labor (Tr. 400-401), and also testified that he cautioned him, saying:

> "Bill, I can see ways in which this can be done for $30,000, but that's no assurance that it will be done for $30,000, because you have control of the amount of equipment, and the speed of the job, and all these other factors that have now come into being."

On cross-examination, Richardson confirmed that this $30,000 estimate came after the procedure and pricing had been agreed upon (Tr. 50). While Richardson could not recall Moritz saying that what it would actually cost VM would depend on what it chose to put on the job, Richardson acknowledged that even if he didn't say it, that he, Richardson, would have understood that to be the fact (Tr. 76-77).

Also uncontroverted is that the amount ordered by Cavalieri was greatly in excess of what the job required, as appears supra, 15. The Trial Judge expressly found that excessive quantities were ordered and that some scaffolding was returned to Waco unused (F. 21 at JA 60). Schmitt, who originally was on the job for three or four days when VM started, and

thereafter at least once every two weeks (Tr. 360), warned Cavalieri as early as July 1970 that the purchases were excessive, and at that time pointed out how, in at least one respect, the job could be done more economically, but Cavalieri disregarded this counsel (Tr. 318-321).

Also uncontroverted with respect to this matter is the testimony of Moritz at Tr. 406-9, wherein he outlines the extent of the excess in purchasing.

As to further efforts to cooperate with Waco after the new agreement was entered, please see Moritz's uncontroverted testimony with respect to its efforts to familiarize VM's foreman, Sid Lamb, with the use of the materials, appearing at Tr. 401.

We believe the foregoing demonstrates that at no time in the saga of the relations between VM and Waco with respect to this job did Waco deal with VM other than in good faith, fairly and honorably. Contrast this with the conduct of VM.

Based upon the foregoing, we submit that the Vermont test for estoppel (Dutch Hill case, supra, 131 Vt at 193) is fully met and should have been applied, and VM should be denied the right to repudiate the consequences of its representations and conduct with respect to the new agreement.

For much the same reasons the doctrine of "promissory estoppel" is equally applicable. As to each of VM's purchase orders specifying the item and price and signed by VM's Cavalieri, the test set forth in the Overlock case, supra, 126 Vt at 53, is met because:

1. Each purchase order was a promise which VM should have reasonably expected to induce action of a definite and substantial nature on the part of Waco, namely the delivery of the material ordered in each such purchase order at the price stated herein.

2. Each of these purchase orders induced Waco to deliver the materials ordered therein.

3. If there is a lack of consideration to enforce the promise made by VM arising out of each purchase order, then injustice can only be avoided by enforcement of such promise.

Therefore, by reason of estoppel, it was prejudicial error to hold the new agreement invalid and unenforceable for want of competent consideration.

VI. THE COURT ERRED IN DENYING WACO'S MOTION FOR A NEW TRIAL

Waco's motion under FRCP 59(a) for a new trial (JA 72) was in part precipitated by the holding that it had failed to demonstrate to what extent VM overextended its

scaffolding requirements (JA 68), and the absence of findings based upon uncontroverted evidence as to the extent thereof. "HTR" as used below refers to the transcript of that hearing.

By its motion Waco sought to have the Trial Judge re-evaluate this evidence, or alternatively to allow Waco an opportunity to present additional evidence with respect to such overextension.

On this issue, had the Trial Judge re-evaluated the evidence, then on the basis of the uncontroverted evidence set forth supra 15, a necessary finding would have been that VM overextended its scaffolding requirements to the following extent: 512 feet of monorail, 113 beams, at least 52 hoisting machines, and 200 feet of staging. Additionally, from this, and based upon an examination of the invoices constituting Ex. DB, such extension, in terms of money, was ascertainable.

Should it be that the Trial Judge, because the invoices constituting Ex. DB were voluminous, preferred that Waco call directly to the Court's attention the applicable invoices reflecting the price of the units above referred to, Waco alternatively requested an opportunity to present such additional evidence based upon these invoices.

The purpose and function of Rule 59(a) as applied here was called to the attention of the Trial Judge (HTR 2-3) and

appears in 6A Moore's Fed Prac., ¶ 59.07 at page 59-97.

Under these circumstances and for the limited purposes stated, it was error as a matter of law to deny the motion. To the extent that it calls for the exercise of a sound discretion by the Trial Judge, such sound discretion was not exercised, and the denial of the motion constituted an abuse of his sound discretion and prejudicial error.

CONCLUSION

Wherefore, the defendant respectfully urges that the Court set aside the Judgment and enter a new Judgment in favor of the defendant on the principal action and on its counterclaim, awarding it the undisputed amount of the unpaid invoices, or $73,886.00, together with interest and costs. In the event the Court declines to enter a new Judgment, the defendant requests a new trial, on the merits, or failing that, on the issue of damages, so that the dollar value of the excessive scaffolding may be determined for the purpose of reducing the damage award.

Respectfully submitted,

DICK, HACKEL & HULL

Dated: November 20, 1974

By Donald Hackel a member
Donald Hackel

By Bernard R. Dick a member
Bernard R. Dick

Attorneys for Appellant
Waco Scaffolding Company

IN THE UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

VERMONT MARBLE COMPANY, Appellee	)	
V.	)	DOCKET NO. 74-1933
WACO SCAFFOLD & SHORING COMPANY, a division of Bliss and Laughlin Industries, Inc., Appellant	)	

PROOF OF SERVICE OF APPELLANT'S BRIEF

I, Donald Hackel, a member of DICK, HACKEL & HULL, attorneys for the Appellant in the above appeal, do hereby certify that on November 22, 1974 I hand delivered two copies of the Brief for Appellant to Robinson E. Keyes, Esq., a member of the firm of Ryan, Smith & Carbine, attorneys for the Appellee.

Dated: November 22, 1974.

Donald H. Hackel

Donald H. Hackel

K, HACKEL & HULL
LAWYERS
0 CENTER STREET
LAND, VERMONT 05701